

DOCUMENT RESUME

02680 - [A1752769]

[Protest against Departure from Solicitation Provisions in Making Contract Award]. B-187645. June 15, 1977. 11 pp.

Decision re: Bunker Ramo Corp.; by Robert P. Keller, Acting Comptroller General.

Issue Area: Federal Procurement of Goods and Services:

Reasonableness of Prices Under Negotiated Contracts and Subcontracts (1904).

Contact: Office of the General Counsel: Procurement Law II.

Budget Function: National Defence: Department of Defense - Procurement & Contracts (050).

Organization Concerned: Department of the Navy: Navy Underwater Tracking Range, St. Croix, VI; Datacom, Inc.

Authority: 10 U.S.C. 2304(g). 31 U.S.C. 620. 26 Comp. Dec. 43. 26 Comp. Dec. 45. A.S.P.R. 2-407.8(b)(3)(iii). A.S.P.R. 3.805.3(c). 4 C.F.R. 20.2(b)(1). 55 Comp. Gen. 244. 55 Comp. Gen. 1111. 55 Comp. Gen. 1119-1121. B-187053(1) (1976). B-185920 (1976). B-187892 (1977).

Protester objected to the award of a contract to another bidder, claiming that the solicitation provisions were departed from in that the award was made on the basis of price instead of technical superiority, as emphasized in the solicitation. The protest was denied because cost can become determining factor when significant technical superiority of one proposal over another does not exist. (QM)

2769

02680

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

*ZUCKERMAN
P. L. II*

FILE: B-187643

DATE: June 15, 1977

MATTER OF: Burke: Ramo Corporation

DIGEST:

1. Where agency reasonably determines that point spread in technical evaluation does not indicate significant superiority of one proposal over another, cost, although designated as least important factor, may become determinative factor in award selection. Further, even though agency initially utilizes unpublished technical/cost trade-off formula, agency is not bound to award contract on basis of that formula so long as award is consistent with published evaluation criteria.
2. Request for second round of best and final offers after agency concluded price would be determinative factor for award because of lack of "decided technical advantage" between offerors did not constitute an auction technique.
3. Allegation that agency's incurrence of additional contract administration costs because of contractor's deficiencies in one area would constitute an improper augmentation of appropriations cannot be sustained where record does not indicate that funds appropriated for procurement purposes will be supplemented by funds appropriated for other purposes.
4. Award to offeror whose lower score can be principally attributed to lack of experience in one technical category is not award in anticipation of deficient performance where offeror takes no exception to specification requirements and deficiencies can be corrected through contract administration.
5. Issue first raised 4 months after protest filed and almost 5 months after basis of protest became known is not timely and will not be considered on its merits.

Bunker Ramo Corporation (BR) protests the award of a contract to Datacom, Inc. for a Data Gathering and Processing System (DGPS) at the Navy Underwater Tracking Range, St. Croix, Virgin Islands.

B-187645

Although a number of subsidiary issues have been raised, the thrust of the BR protest is that the Navy departed from the solicitation provisions by awarding on the basis of price instead of technical superiority as emphasized in the solicitation.

Request for proposals (RFP) No. N00406-76-R-0578 was issued on May 11, 1976, and six offers were received. The evaluation criteria included in the RFP were as follows:

"1.7 Evaluation of all submitted proposals will be in accordance with the evaluation criteria shown in Section D of this solicitation. 'Technical Evaluation Criteria and Checklist'. The maximum available points are 1000. They are divided in seven areas as shown in 1.9 below. Thereafter technically qualified proposals will be evaluated with regard to submitted cost proposals.

"1.8 EVALUATION CRITERIA AND THE BASIS FOR AWARD

The contract resulting from this solicitation will be awarded to that responsible Offeror whose offer, conforming to the solicitation, is determined most advantageous to the government, Cost and other factors considered. The offeror's proposal shall be in the format prescribed by, and shall contain a response to each of the areas identified in the Statement of Work and Section D, paragraph 1.1 thru 1.7 above. The evaluation factors are listed in descending order of importance in para 1.9 below.

"1.9 Technical Evaluation Factors (Relative Importance). The technical proposal must give clearly and in detail sufficient information to enable evaluation based on factors listed below. Such factors will be weighted, along with cost and price, for evaluation in the following order of importance.

- I. TECHNICAL (IAW Statement of Work)
- II. INTEGRATED LOGISTIC SUPPORT (ILS)
(IAW Statement of Work)
- III. SOFTWARE (IAW Statement of Work)
- IV. ADMINISTRATION & MANAGEMENT
(IAW Statement of Work)

B-187645

- V. SAFETY (IAW Statement of Work)
- VI. MAINTAINABILITY (IAW Statement of Work)
- VII. OTHER INCLUDING COST AND COST REALISM.

"1.10 COST, INCLUDING COST REALISM: Although cost is the least important evaluation factor, it is an important factor and should not be ignored. The degree of its importance will increase with the degree of equality of the proposals in relation to the other factors on which selection is to be based. Furthermore, costs will be evaluated on the basis of cost realism. Cost realism pertains to the offeror's ability to project costs which are reasonable and which indicate that the offeror understands the nature of the work to be performed."

The 1,000 points specified as the maximum available were not further allocated in the RFP to the categories listed for consideration.

Prior to the receipt of proposals for evaluation points were assigned to the general categories as follows:

Technical	300
Integrated Logistics Support (ILS)	230
Software	220
System Technical Documentation	90
Management	110
Safety	50

Each category was further broken into subcategories with points assigned to individual considerations within a subcategory. For example, the ILS area had 6 subcategories and 21 individual items for consideration.

In addition, the evaluation plan (not the RFP) contained a trade-off formula which weighted technical scores at 90 percent and cost at 10 percent to arrive at an "evaluation factor" in the following manner:

$$\text{Evaluation Factor} = (\text{Points Scored/Maximum Score}) .9 + (\text{Low Cost/Offer Cost}) .1$$

B-187645

Evaluation of the six proposals received yielded the results as follows:

<u>Offeror</u>	<u>Average Technical Score</u>	<u>Trade-Off Score</u>	<u>Price Proposal</u>
Bunker Ramo	823	.970	\$1,471,829
Electrospace Systems, Inc.	816	.966	1,139,215
Operating Systems, Inc.	759	.926	1,044,475
Datacom, Inc.	755	.920	837,571
C-3	543	.700	972,860
Metric Systems	533	.697	1,303,988

BR reduced its price prior to negotiation (to \$1,199,934), as did Operating Systems (to \$940,152). After initial evaluation, Metric Systems and C-3 were excluded from the competitive range for the purpose of negotiation.

According to the contracting officer, technical discussions were held with all offerors determined to be within the competitive range during the week of August 13, 1976. Technical scores were apparently not modified after these discussions, although it is reported that the technical deficiencies noted in the original technical evaluation were discussed with all offerors responding favorably, and that as a consequence all offerors had "satisfactorily demonstrated an ability to perform." Offerors were also requested to price previously unpriced provisioning items on a not-to-exceed basis. Best and final offers were requested on October 1, 1976, with the following result:

<u>Offeror</u>	<u>Price</u>	<u>Trade-Off Score</u>
Bunker Ramo	\$1,207,050	.972
Electrospace Systems, Inc.	1,079,655	.973
Operating Systems, Inc.	989,012	.918
Datacom, Inc.	875,417	.926

B-187645

The Navy concluded that no offeror within the competitive range had a "decided technical advantage" over any other offeror and that price was thus the determinative factor. It was decided that the "technical difference" reflected in the scoring could be primarily related to the advantage ElectroSpace Systems, Inc. (ESI) [and BR] had in the ILS area because of previous experience, but that Datacom would overcome that advantage by virtue of the Navy's working more closely with it in the ILS area during contract administration. The Navy estimated that the additional costs of contract administration would be approximately \$35,000, substantially less than the more than \$200,000 difference requested by the higher priced offerors.

The Navy then decided it was appropriate to advise offerors that price had become the determinative factor in the award of the contract and to request a second round of best and final offers on that basis. Only ESI chose to modify its offer and reduced its price to \$969,999. BR, having protested on October 12, 1976 any award based on lowest cost, took exception to the latter request for best and finals by telex dated October 20, 1976, but reaffirmed its original best and final offer. Award was made to Datacom on November 1, 1976, in accordance with Armed Services Procurement Regulation (ASPR) § 2-407.8(b)(3)(iii) (1975 ed.), which provides that award shall not be made until the protest is resolved, unless the contracting officer determines that "a prompt award will be otherwise advantageous to the Government."

A. Adherence to Evaluation Criteria

BR asserts that the decision to award on the basis of price was improper because the RFP emphasized technical considerations in the evaluation of the proposals. BR states that the 90 percent technical, 10 percent cost trade-off formula (set forth above) appropriately reflected that emphasis and should have been adhered to by the Navy. In this regard BR states that prior to submitting its proposal it discussed the proposal evaluation criteria with the contracting officer, and as a result learned of the trade-off formula, and consequently decided to compete only because of the heavy weight given to technical factors versus cost. According to BR, it regarded the formula as consistent with the RFP provisions with respect to the importance of cost as a factor as the degree of equality of the technical proposals increased.

BR further asserts that its and ESI's technical and management proposals were considered to have scored "very high," that the two proposals not within the competitive range were considered "very low," and that therefore it and ESI were "high" as compared to Operating Systems, Inc. (OSI) and Datacom. Accordingly, BR takes strong issue with the Navy's finding that the technical evaluation scores did not reflect a significant technical advantage in the BR and ESI proposals. BR argues that Datacom's proposal particularly was deficient in the ILS area and that the agency's acceptance of those deficiencies was contrary to the requirements of the solicitation.

As we have previously noted, neither the 90 percent technical, 10 percent cost trade-off formula nor the points assigned to each "technical" category was contained in the RFP. The solicitation only noted that the order of importance of each category in descending order, with cost shown as the least important factor, subject to the proviso that the importance of cost would increase as the equality of competing proposals in the technical areas also increased. Thus, what must first be determined is whether the Navy could reasonably view the Datacom proposal as essentially equal to the BR proposal despite the disparity in the point scoring.

The record in this case shows that approximately 196 individual items were addressed in the various categories requiring the exercise of a subjective judgment by each of the evaluators, with point values for those items ranging between 1 and 80. Our review, after allowing for certain necessary adjustments (such as in the safety category to reflect the total points [50] actually assigned rather than the sum [100 points] of the items shown within the category) further shows there was a substantial variance among the point scores given by the evaluators within identical categories. For example, in the software category, one evaluator rated BR five points (5) higher than Datacom, two gave both parties perfect scores (230), one rated Datacom substantially higher (210 vs. 178), and one, while rating Datacom higher, apparently considered both to be somewhat deficient (143 vs. 130). The same pattern (although not consistent between evaluators) repeats itself in the safety category. In the technical category (weighted at 30 percent of the total), four of the five evaluators rated the Datacom proposal higher, with a 33 point edge in favor of Datacom in one instance. In the ILS area (weighted at about 22 percent) all evaluators considered the BR proposal to be better; however, the point spread again varied widely (from a mere 8 point advantage

B-187645

to one as high as 64 points). The total averaged point scores gave BR a 52 point lead (831 vs. 779) or a "grade" of 83.9 percent opposed to Datacom's 78.7 percent. However, Datacom was higher rated in those categories worth 52.5 percent of the total score with BR scored higher in categories valued at 47.3 percent of the total.

We believe this review points up the basis for our view that numerical point scores, when used for proposal evaluation, are useful as guides to intelligent decision-making, see 52 Comp. Gen. 686 (1973), but are not themselves controlling in determining award, since it is apparent that averaged scores may reflect the disparate, subjective and objective judgments of the evaluators. Thus, it has consistently been our position that whether a given point spread between competing offerors alone may indicate the significant superiority of one proposal over another depends on the facts and circumstances of each procurement and that while technical point scores and descriptive ratings must of course be considered by source selection officials, such officials are not bound thereby. Bell Aerospace Company, 55 Comp. Gen. 244 (1975), 75-2 CPD 168; Grey Advertising, Inc., 55 Comp. Gen. 1111, 1119-21, 76-1 CPD 325.

We do not find the Navy's judgment that the Datacom proposal was essentially equal technically to the BR and ESI proposals to be other than rational. The point spread itself, of course, was clearly not of a magnitude to compel the conclusion that the Datacom proposal was significantly inferior. See Grey Advertising, supra, and cases cited therein. Further, although BR suggests that the ILS portion of the Datacom proposal was worth "essentially zero," the record shows that the evaluators, while rating the Datacom proposal lower in varying degrees in the ILS area when compared with the ratings given the BR and ESI proposal, did not view that proposal as worthless, and in fact gave it substantial scores. (In this regard, we point out that it is not our function to evaluate proposals or to make an independent judgment as to the precise numerical scores which should have been assigned each proposal. Automatic Laundry Company of Dallas, B-185920, July 13, 1976, 76-2 CPD 38.) Moreover, in Grey Advertising, supra, we recognized that source selection officials may consider a numerical scoring advantage which they find is based primarily on the advantages of incumbency as not indicating a significant technical advantage which would warrant paying substantially more for it.

Here, the Navy's conclusion that Datacom's lower score was due primarily to deficiencies in the ILS area and that those deficiencies were essentially a reflection of the firm's lack of experience in

that area appears to be reasonable and is not contradicted by anything in the record. The Navy's further conclusion that those deficiencies, rather than indicating a fundamental weakness in Datacom's proposal, were of the kind that could be handled administratively after award, is also uncontradicted by the record. Thus, we cannot say that the Navy's overall conclusion that the point scores did not indicate an advantage warranting the expenditure of an additional \$324,000 because the competing proposals were essentially technically equal is without a rational basis.

Once the proposals could be viewed as essentially equal technically, it was incumbent upon the contracting officer to consider cost. Indeed, in view of the provisions of 10 U.S.C. 2304 (g), which require that price be considered in the award of all negotiated contracts, he would have been remiss had he not done so. Grey Advertising, supra, at 1124. This does not mean that the evaluation criteria were changed or ignored. In any case where cost is designated as a relatively unimportant evaluation factor, it may nevertheless become the determinative factor when application of the other, more important factors do not, in the good faith judgments of source selection officials, clearly delineate a proposal which would be most advantageous to the Government to accept. See, e.g., Grey Advertising, supra, at 1124 and cases cited therein. As we said recently in Computer Data Systems, Inc., B-187892, June 2, 1977, 77-1 CPD ___:

"The designation of cost or price as a subsidiary evaluation factor means only that, where there is a technical advantage associated with one proposal, that proposal may not be rejected merely because it carries a higher price tag. It does not mean that when technical proposals are regarded as essentially equal, price or cost is not to become the controlling factor."

In any event, no offeror in this procurement can complain of being misled on this point since the RFP explicitly stated that the importance of cost would increase as the technical equality of proposals increased. Moreover, the contracting officer reopened negotiations and afforded offerors the opportunity to submit new best and final offers on the announced basis of cost as the new determinative criterion for award.

With regard to BR's assertion that it was informed of the trade-off formula to be used and therefore was misled when selection was not based on application of that formula, we point

B-187645

cut that there was nothing in the RFP itself to suggest that any particular formula would be applied, and the Navy denies that the contracting officer disclosed the precise weights to be accorded cost and technical factors. The Navy acknowledges that prior to the receipt of proposals, BR sought information as to how evaluations were to be conducted, and that they were advised that:

"* * * [t]he exact percentages that might be applied as a formula had not yet been determined but would be established prior to the receipt of offers; that all offerors would be scored on a maximum of 1,000 points and that a formula would be applied in a 'trade-off' basis with a percentage for technical score and a percentage for cost. He [the contracting officer] further advises that BR asked what percentage might be used for technical and what percentage for cost and that BR was not told the precise percentage but example figures such as 90%/10% and 80%/20% were used only for illustrative purposes. He advises that several times he repeated that the percentages were examples only and should not be used for working up the decision to offer or not to offer."

Even if we were to assume, arguendo, that the Navy's statement is inaccurate and that BR had obtained the precise formula from some source within the Navy prior to the proposal submittal, BR would be in no position to insist that the Navy adhere to that unpublished evaluation formula and would run the risk that the formula would be changed so long as the change was consistent with the published criteria available to all competitors.

B. Second Request for Best and Final Offers

Protester asserts that the Navy's request for second best and final offers after price became the determinative factor in the award constituted an auction technique prohibited by ASPR § 3.805.3(c).

An auction technique usually arises when there has been an improper disclosure of an offeror's identity and/or the contents of a competing proposal during an on-going negotiated procurement. There is no evidence to suggest that such improper disclosure occurred in this case. Although an unjustified call for new best and final offers could constitute an auction technique, we have often pointed out that requests for additional rounds of best and final offers do not per se indicate the existence of an auction.

B-137645

See Bell Aerospace Company, supra, and cases cited therein. Moreover, here we think it clear that the Navy had an adequate reason for requesting another round of best and finals. Accordingly, we see no merit in protester's contention that an auction existed.

C. Misuse of Appropriated Funds

Protester asserts that \$35,000 in contract administration costs which the Navy estimates may be incurred in working more closely with Datacom in the ILS area is a misuse of appropriated funds as an "unauthorized augmentation of appropriations for procurement by the Navy."

The use of appropriated funds is limited by statute to the purposes for which the funds were appropriated. 31 U.S.C. 628. The general rule is, therefore, that when a specific appropriation has been made for all necessary expenses incident to a Government activity, all expenditures for such purpose must be made from such appropriation absent express authority to the contrary. 26 Comp. Dec. 43, 45 (1919). There is nothing in the record from which to conclude that the agency is or may supplement the appropriation obligated for the procurement in question with funds appropriated for another purpose.

D. Award in Anticipation of Deficient Performance

Protester asserts that the contract was awarded in anticipation of deficient performance and for less than was required by the solicitation, with the result that the contract award was improper. We understand BR to be referring to Datacom's lack of experience in the ILS area. Datacom, however, took no exceptions to the ILS specification, and Datacom's contract requires no less than that required by the RFP. We do not view Datacom's lower score in ILS as evidence of an inability to perform any more so than BR's less than perfect scores would indicate an inability on the part of that firm. The fact that Datacom may have been relatively weak in the ILS area does not mean that Datacom cannot or is not expected to perform in accordance with minimum agency requirements. There is no merit to BR's argument.

E. Not-to-exceed Pricing Request

The protest was filed on October 13, 1976. In comments filed by letter dated February 11, 1977, the protester for the first time raised the issue of the propriety of requesting not-to-exceed prices for previously unpriced provisioning items. The agency

B-187645

request for not-to-exceed prices was made on September 21, 1976. There is no record of any protest raised by BR at the time of the request or within the time allowed by section 20.2(b)(1) of our Bid Protest Procedures, which states:

"* * * In the case of negotiated procurements, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated therein must be protested not later than the next closing date for receipt of proposals following the incorporation."
4 C.F.R. § 20.2(c)(1) (1977)

The next closing date for the receipt of proposals following incorporation of the not-to-exceed price request was October 1, 1976. Therefore, inasmuch as that issue has not been timely filed, it will not be considered on its merits.

F. Award Pending Protest

BR objects to the award of the contract notwithstanding the protest with this Office, and disputes any finding of urgency related to the scheduled reduced operations at the St. Croix range during August 1977, asserting that underwater tracking range schedules change frequently. The Navy's finding that the prompt award would be otherwise advantageous to the Government, is grounded upon the scheduling of the Atlantic Fleet training schedules which it is stated is "done almost one year in advance." While we recognize that training schedules may be modified for fleet operational reasons, protester has not produced any evidence to suggest that the modification of training schedules can readily be modified without serious and costly impact on the fleet's operations. We are therefore unable to conclude that the contracting officer's finding that a prompt award would be advantageous to the Government was in error. What-Mac Contractors, Inc.; Chemical Technology, Inc., B-187053(1), November 19, 1976, 76-2 CPD 438.

The protest is denied.


Acting Comptroller General
of the United States